

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY

CORRECT 3 PM 3:40

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9. If you did appeal, answer the following:

(a) Name of court UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

(b) Result District Court's Judgment was AFFIRMED

(c) Date of result November 20, 2003

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court UNITED STATES SUPREME COURT

(2) Nature of proceeding Petition for a Writ of Certiorari

(3) Grounds raised (I) The Indictment failed to provide adequate notice because it only incorporates the conspiracy count into the CCE count. (II) A § 846 conspiracy can serve as one of the three predicate offense to support a CCE charge. (III) The lower court decision was contrary to the rule announced in Apprendi.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result Petition Denied

(6) Date of result June 1, 2004

(b) As to any second petition, application or motion give the same information:

(1) Name of court UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

(2) Nature of proceeding Motion to Recall Mandate

(3) Grounds raised In light of Blakely v. Washington, U.S. , 124 S. Ct. 2531 (2004), the "statutory maximum" for Apprendi purposes is the maximum a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. Accordingly the sentence entered herein should be vacated.

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(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒(5) Result Motion Denied(6) Date of result December 10, 2004

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☒(2) Second petition, etc. Yes ☐ No ☐

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

Motion for Recall of Mandate was directed to the appellate  
federal court itself and an appeal to that court was not proper.  
However, a petition for Writ of Certiorari was sought on January  
6, 2005, and denied on February 28, 2005.

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.

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- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: Denial of effective assistance of counsel at all critical stages of trial and on direct appeal.

Supporting FACTS (state *briefly* without citing cases or law) (1) When defense counsel failed to "timely" request dismissal of indictment because; government delay in bringing accusations; government violation of the statutes limitations and the doctrines of stoppel and laches; (2) When same counsel failed to impeach government's witness with "critical" evidence showing false testimony; (3)  
 (continued on next page.....)

B. Ground two: Conviction and Sentence were obtained because the Trial Court's errors of constitutional dimensions.

Supporting FACTS (state *briefly* without citing cases or law): (1) By denying request for a Special Verdict Sheet requiring the jury to determine the amount and type of drugs attributable to each defendant; (2) By determining the amount and type of drugs on its own findings and by preponderance of evidence; (3) By sentencing Petitioner under a subsection of 21 U.S.C. § 848 that Petitioner  
 (continued on next page.....)

C. Ground three: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

A. Ground One:

Supporting FACTS (continued from previous page),...same counsel failed to seek to instruct the jury with an alternative "less included offense" instruction, as a curative measure to balance the trial's unfairness caused by government's actions; (4) When that counsel failed to seek a sentencing option under the less included conviction, as a less drastic curative measure to balance the trial's unfairness because of the government's numerous misconducts; and (5) When that counsel failed to pursue on direct appeal Petitioner's violation of his right to confront witness under the Sixth Amendment of the Constitution, after having strongly opposed to that violation during trial.

B. Ground Two:

Supporting FACTS (continued from previous page), had not been charged with in the superseding indictment; and (4) By allowing the use of "expert" calculations on cocaine base during trial and sentencing.

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D. Ground four: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: Denial of effective assistance of  
counsel's grounds as listed in 12 A were not previously presented,  
because Petitioner was not aware of counsel's ineffectiveness until  
he read trial, sentencing transcript and appeal brief. Furthermore,  
because this issues are ordinarily more acceptable in this forum.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?  
 Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Miriam Ramos Gateroles, Esq.

PO Box 191352, San Juan, Puerto Rico, 00919-1352

(b) At arraignment and plea Same as above

(c) At trial Same as above

(d) At sentencing Same as above

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(e) On appeal Same as above

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: \_\_\_\_\_

(b) Give date and length of the above sentence: \_\_\_\_\_

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☒

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

\_\_\_\_\_  
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

May 25, 2005

(date)

Juan A. Lote Ramirez  
Signature of Movant